THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ZANGO, INC. , Plaintiff, v. PC TOOLS PTY, LTD., Defendant.	Case No. 07-CV-00797 JCC **DEFENDANT'S MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION AND IMPROPER VENUE** **NOTE ON MOTION CALENDAR: June 22, 2007**

Defendant PC Tools moves for an order dismissing the above-captioned action. This Court lacks personal jurisdiction over PC Tools and the Western District of Washington is an improper venue for this litigation.

FACTUAL BACKGROUND

Plaintiff Zango is best known for being the former "180solutions" that was the subject of an FTC complaint and investigation that resulted in Zango settling the charges, agreeing to pay a $3 million fine for ill-gotten gains, and agreeing to strict controls and continuing oversight over its business. The FTC charges alleged that Zango used unfair and deceptive practices to surreptitiously download adware (which monitors users' Internet use to display pop-ads) onto computers of unsuspecting users and then obstructed those users' efforts to remove the adware. *See generally*, http://www.ftc.gov/opa/2006/11/zango.shtm.

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Defendant PC Tools is an Australian company with around 150 employees based in Sydney, Australia. PC Tools' flagship product is a leading anti-spyware software product called Spyware Doctor. PC Tools' core business is detecting and informing computer users of potentially harmful software (generically referred to as "malware"), including the type of adware purveyed by Zango.

Ironically, in this lawsuit, Zango claims PC Tools is the wrongdoer. Zango claims that PC Tools' Malware Research Centre wrongfully classified Zango's software as malicious. *See, e.g.*, Complaint, ¶ 12. PC Tools is filing an opposition to Zango's motion for temporary restraining order, per the Court's order setting a briefing schedule on that motion.

But PC Tools first argues by this motion that the Court does not have jurisdiction over PC Tools such that an enforceable injunction could issue, and that the case also should be dismissed for improper venue. *Zepeda v. I.N.S.*, 753 F.2d 719, 727 (9th Cir. 1984) (holding that court cannot issue an injunction without personal jurisdiction over the parties). The Malware Research Centre is located at PC Tools' headquarters in Sydney, Australia. *See* Declaration of Neill Whitehead, ¶ 2. The PC Tools employees who develop Spyware Doctor and assign classifications to third-party software like Zango's programs are also located in Sydney, Australia. *Id.* Zango reached into Australia and initiated contact with PC Tools on the subject matter made the basis of Zango's claims, and PC Tools' only contact with Zango has been to respond to Zango's inquiries.

Furthermore, PC Tools has not:

- Owned or leased real or personal property in the state of Washington;
- Owed or been required to pay taxes in the state of Washington;
- Maintained an office in the state of Washington;
- Had employees or contractors in the state of Washington;
- Solicited or entered into agreements with resellers or affiliates known to be Washington residents or because they were Washington residents;

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- Conducted business with Zango over PC Tools' or Zango's websites;
- Conducted advertising (print, radio, TV, or online) that was directed or circulated to only Washington residents or a small number of states including Washington;
- Conducted promotions directed only to Washington residents or a small number of states including Washington; or
- Sponsored events in Washington or a small number of states including Washington.

See Declaration of Neill Whitehead, ¶ 5. PC Tools only has limited contacts with Washington through the PC Tools' website. *See* Declaration of Neill Whitehead, ¶ 6.

ARGUMENT

I. THE COURT DOES NOT HAVE PERSONAL JURISDICTION OVER PC TOOLS.

In a diversity action, the question of personal jurisdiction is governed by the law of the forum state. *See Van Steenwyk v. Interamerican Management Consulting Corp.*, 834 F. Supp. 336, 339 (E.D. Wash. 1993) (*citing Metropolitan Life Ins. Co. v. Neaves*, 912 F.2d 1062, 1065 (9th Cir. 1990). As a result, to establish jurisdiction, Zango has the burden of showing that one of Washington's jurisdictional statutes confers jurisdiction over PC Tools and that the exercise of jurisdiction accords with federal constitutional principles of due process. *See Amoco Egypt Oil Co. v. Leonis Nav. Co., Inc.*, 1 F.3d 848, 850 (9th Cir. 1993); *see also Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1154 (9th Cir. 2006) (in the context of a motion to dismiss for lack of personal jurisdiction, plaintiff bears the burden of establishing a *prima facie* basis that court has jurisdiction).

Under Washington's long-arm statutes, personal jurisdiction may be either general or specific. RCW 4.28.080(10) creates general jurisdiction. *See Hein v. Taco Bell, Inc.*, 60 Wn. App. 325, 328, 803 P.2d 329 (1991). RCW 4.28.185 creates specific jurisdiction. *MBM Fisheries, Inc. v. Bollinger Mach. Shop & Shipyard, Inc.*, 60 Wn. App. 414, 422, 804 P.2d 627

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(1991). Washington's two statutes are coextensive with the bounds of due process. *See Amoco*, 1 F.3d at 850-51. As a result, "the statutory and constitutional standards merge into a single due process test." *Id*. at 851; *see also Kulchin Foundation Drilling Co. v. Axis Specialty Ins. Co.*, 2007 WL 858068, *2 (W.D. Wash. 2007) ("Since Washington's long-arm statute extends to the limits of federal due process, the Court need only analyze whether the exercise of personal jurisdiction over Icon comports with federal due process.") (citation omitted).

Even if a defendant's contacts satisfy either test, the exercise of jurisdiction must not "offend traditional notions of fair play and substantial justice." *See*, *e.g.*, *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1332 (9th Cir. 1984) (addressing this inquiry separate from the minimum contacts analysis). *See also Trierweiler v. Croxton and Trench Holding Corporation*, 90 F.3d 1523, 1533 (10th Cir. 1996).

A. SPECIFIC JURISDICTION

Specific jurisdiction exists when a defendant 'purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws,'" and the action arises directly from defendant's contact with the forum state. *See Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1169 (9th Cir. 2006) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). *See also Oregon ex rel. Department of Transp. v. Heavy Vehicle Electronic License Plate, Inc.*, 157 F. Supp. 2d 1158, 1167 (D. Or. 2001). Based on the foregoing, the Ninth Circuit utilizes a three-part test for determining whether specific jurisdiction exists. Zango must prove that: (1) PC Tools purposefully availed itself of the privilege of conducting activities in Washington by some affirmative act or conduct; (2) Zango's claim arises directly out of or results from PC Tools' forum-related activities; and (3) the exercise of jurisdiction in this case is reasonable. *See Roth v. Garcia Marquez*, 942 F.2d 617, 620-21 (9th Cir. 1991).

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1. PC TOOLS DID NOT PURPOSEFULLY AVAIL ITSELF OF WASHINGTON'S PRIVILEGES BECAUSE PC TOOLS ONLY RESPONDED TO ZANGO'S INQUIRIES INITIATED BY ZANGO INTO AUSTRALIA.

In this case, Zango alleges intentional torts. In intentional tort cases, the Ninth Circuit analyzes the purposeful direction or availment requirement for specific jurisdiction under the "effects" test derived from *Calder v. Jones*, 465 U.S. 783 (1984). *Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223 F.3d 1082, 1087 (9th Cir. 2000). The "effects" test requires that the defendant allegedly have (1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm, a significant amount of which is suffered, and the defendant knows is likely to be suffered, in the forum state. *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006) (*citing Bancroft*, 223 F.3d at 1087). To satisfy this test, it must be established that the defendant engaged in wrongful conduct targeted at a plaintiff whom the defendant knew to be a resident of the forum state. *Id*.

PC Tools did none of this. PC Tools conducts independent analyses and rates tens of thousands of programs, never really knowing where the software maker/publisher is located. Obviously at some point in the process of rating the myriad software programs out there, PC Tools classified Zango's programs as malicious. Then, after the fact, Zango reached into Australia and initiated conduct with PC Tools. Zango contacted PC Tools because Zango was unhappy with the way PC Tools rated or classified Zango's software programs. *See* Declaration of Neill Whitehead, ¶ 4; *see also* Declaration of John Sarapuk, ¶ 14, including Exhibit 2 attached thereto (submitted with Opposition to Motion for Temporary Restraining Order). PC Tools has not initiated any contact with Zango regarding any independent subject matter not already initiated by Zango; PC Tools only has responded to Zango's inquiries. *See* Declaration of Neill Whitehead, ¶ 4. A defendant does not purposefully avail itself of a state's privileges when it responds to contact or conduct by a forum plaintiff; a defendant must perform some type of affirmative conduct that promotes its transaction of business in the forum state. *See, e.g., Tech. Witts, Inc. v. Skynet Elec. Co.*, 2007 WL 809856 (D. Ariz. 2007).

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2. THERE IS NO RELATIONSHIP BETWEEN A PC TOOLS WASHINGTON CONTACT AND ZANGO'S CLAIMS IN THIS CASE.

Zango's claims must arise directly out of or result from forum-related activities on the part of PC Tools. For the "nexus" prong to be satisfied, "the contacts constituting purposeful availment must be the ones that give rise to the current…suit." *Bancroft*, 223 F.3d at 1088; *see also Ballard v. Savage*, 65 F.3d at 1498 (declining to consider certain of the defendant's contacts with the forum state for specific jurisdiction purposes because plaintiff's case against the defendant did not concern those contacts); *American Network, Inc. v. Access America/Connect Atlanta, Inc.*, 975 F. Supp. 494, 499 (S.D.N.Y. 1997). Zango must show that "but for" forum-related activities by PC Tools through which PC Tools purposely availed itself of Washington's privileges, Zango would not have suffered the alleged injury. *Ballard*, 65 F.3d at 1500.

Zango cannot satisfy this but-for requirement. PC Tools has no hallmark contacts with Washington. *See* Declaration of Neill Whitehead, ¶ 5. PC Tools only has a sliver of contacts with Washington via PC Tools' website. *See* Declaration of Neill Whitehead, ¶ 6. Zango alleges very little by way of jurisdictional facts in its Complaint, but Zango's Complaint does make clear that the gravaman of Zango's case is its feeling that PC Tools improperly rated or classified Zango's software. *See* Complaint, ¶¶ 10-13. Zango has known all along that this function is performed entirely within Australia (in particular, at the "Malware Research Centre" at PC Tools' headquarters in Sydney, Australia); *see* Declaration of Neill Whitehead, ¶ 2. *See also* Declaration of John Sarapuk, ¶ 14, including Exhibit 2 attached thereto. Put another way, Zango does not identify a single contact that PC Tools has with Washington.

Moreover, to the extent Zango's Complaint relies on Internet-based contacts, those contacts are with a website that is not run by or owned by PC Tools. Specifically, Zango says it first started noticing alleged damage when Spyware Doctor Starter Edition was added to the "Google Pack," a free download of assorted computer software from pack.google.com. This, of course, is a website operated by Google, Inc, not by PC Tools. Google is located in Mountain

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View, California. All dealings between PC Tools and Google relating to Spyware Doctor Starter Edition's inclusion in the Google Pack are handled by PC Tools employees working in PC Tools' office in Sydney, Australia. *See* Declaration of Neill Whitehead, ¶ 2.

3. IT WOULD BE UNREASONABLE TO ASSERT JURISDICTION OVER AUSTRALIA-BASED PC TOOLS.

It would be unreasonable to exercise jurisdiction in this case over an Australian company that has had contact with Zango only as a result of Zango-initiated inquiry. The Ninth Circuit has articulated seven factors to determine whether the exercise of jurisdiction over a non-resident defendant comports with fair play and substantial justice, none of which is dispositive, but all of which the Court must consider: (1) the extent of the [defendant's] purposeful interjection into the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent of conflict with the sovereignty of the [defendant's] state; (4) the forum state's interest in adjudicating the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the forum to the plaintiff's interest in convenient and effective relief; and (7) the existence of an alternative forum. *Core-Vent v. Nobel Industries*, 11 F.3d 1482, 1487-88 (9th Cir. 1993). This analysis is even more stringently applied against jurisdiction when the defendant is based in a foreign country. These seven factors establish that the exercise of jurisdiction in Washington would be unreasonable.

a) PURPOSEFUL INTERJECTION

As compared to the purposeful availment analysis (discussed above), "a greater volume of additional connections is required to justify the exercise of jurisdiction when weighing reasonableness factors." *Core-Vent v. Nobel Industries*, 11 F.3d 1482, 1488 (9th Cir. 1993). The "smaller the element of purposeful interjection, the less is jurisdiction to be anticipated and the less reasonable is its exercise." *Ins. Co. of North America v. Marina Salina Cruz*, 649 F.2d 1266, 1271 (9th Cir. 1981).

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Here, PC Tools' contacts with Washington are so attenuated that the "purposeful interjection" factor weighs heavily against the exercise of jurisdiction. As discussed above, Zango reached into Australia and initiated contact with PC Tools after PC Tools assigned a classification to Zango's programs without knowing or caring where Zango was located. PC Tools only has responded to Zango's inquiries. None of the acts complained of by Zango occurred in Washington. PC Tools does not have material contacts with Washington. *See* Declaration of Neill Whitehead, ¶ 5.

b) BURDEN

The "unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114 (1987). Even residents in our neighboring country to the north, Canada, are afforded stricter protection against the exercise of personal jurisdiction: "Though the burden of litigating [an] action [against a Canadian organization] in California would not be insurmountable...it would nonetheless be substantial." *Rocke v. Canadian Auto. Sport Club*, 660 F.2d 395, 399 (9th Cir. 1981). In *Rocke v. Canadian Auto. Sport Club*, the Ninth Circuit found that "[although] modern transportation had indeed reduced some of the burden of litigation in a faraway forum, a foreign defendant "nonetheless face[s] a significantly greater burden defending [an] action in [the U.S.]," particularly where the alleged acts giving rise to the claim occurred in the defendant's home country and most of the discovery would be centered in the defendant's home country.

The company that has made and continues to make the classification decisions regarding thousands of third-party software programs, including Zango's programs, is an Australian company called PC Tools Research Pty Ltd. A small (approximately six employees), separate sister-company called PC Tools, Inc. is located in San Francisco, California, but that company did not perform any of the acts Zango puts at issue, *i.e.*, classification of Zango's software

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programs. All of PC Tools' witnesses as to the facts alleged and claims asserted by Zango live in Australia. All of the discovery to be pursued from PC Tools will be in Australia. The burden on PC Tools of litigating this case in Washington would be substantial. This factor weighs heavily against the exercise of jurisdiction.

c) SOVEREIGNTY INTEREST

The Court also must weigh the extent to which the exercise of jurisdiction by a federal court in Washington would conflict with the sovereignty interests of the alternative forum. *See Panavision International v. Toeppen*, 141 F.3d 1316, 1323 (9th Cir. 1998). Where the defendant is a resident of a foreign nation rather than a resident of another state within our federal system, the sovereignty barrier is 'higher.'" *Rocke*, 660 F.2d at 399. The U.S. Supreme Court has cautioned that "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi*, 480 U.S. at 115 (citation omitted). The Ninth Circuit likewise has given great weight to this factor in cases where the defendant is a resident of a foreign country. *See Core-Vent Corp.*, 11 F.3d at 1489 ("The foreign-acts-with-forum-effects jurisdictional principle must be applied with caution, particularly in an international context.") (*citing Pacific Atlantic Trading Co. v. M/V Main Exp.*, 758 F.2d 1325, 1330 (9th Cir. 1985)). As a result, the fact that a defendant is a resident of a foreign country "tends to undermine the reasonableness of personal jurisdiction." *Callaway Golf Corp.*, 125 F. Supp. 2d at 1206.

PC Tools is an Australian corporation. The Australian Government has an interest in ensuring that unreasonable restrictions are not placed on its resident corporations' abilities to conduct business and, in the case of PC Tools, provide computer security to consumers. In the same context, the Australian Government would have more of an interest in policing its resident corporations if indeed Zango could prove any wrongdoing. By contrast, PC Tools has not targeted any of its commercial activities at Washington, and certainly not specifically at Zango,

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which initiated the contact with PC Tools in Australia. As a result, this factor weighs heavily against the exercise of jurisdiction.

d) WASHINGTON'S INTEREST

Washington has an interest in protecting its citizens, and Zango is a citizen. But Washington does not have an interest in trying to tie the hands of PC Tools, a leading anti-spyware provider, for the benefit of Zango, a company that less than three months ago entered into a final settlement with the U.S. Government in FTC proceedings whereby Zango agreed to a $3 million fine and strict controls on the future operation of its adware business. Washington certainly does not have an interest in making its citizens vulnerable to malware – the type of software associated with Zango and detected by PC Tools. This factor cuts against jurisdiction.

e) EFFICIENCY OF THE FORUM

As explained above, all discovery relating to PC Tools will be in Australia. That is where the witnesses are, that is where the documents are, that is where the conduct made the subject of Zango's claims occurred. This factor weighs against asserting jurisdiction.

f) CONVENIENCE TO PLAINTIFF

Of course Zango will argue that this forum is more convenient. But, "no doctorate in astrophysics is required to deduce that trying a case where one lives is almost always a plaintiff's preference." *Roth*, 942 F.2d at 624. This is the very reason that this factor carries little weight in the overall jurisdictional analysis. *See Core-Vent Corp.*, 11 F.3d at 1490.

g) AVAILABILITY OF AN ALTERNATE FORUM.

Zango bears the burden of establishing the unavailability of an alternative forum. *Core-Vent*, 11 F.3d at 1490. However, as several courts have held, Australia provides an adequate alternative forum. *See, e.g., Allstate Life Ins. Co. v. Linter Group Ltd.*, 994 F.2d 996, 1001-1002 (2d Cir.), *cert. denied*, 510 U.S. 945 (1993) (securities fraud); *Great Prize, S.A. v. Mariner Shipping Party, Ltd.*, 967 F.2d 157, 160 (5th Cir. 1992) (dispute regarding ownership of property); *In re Silicone Gel Breast Implants Products Liability Litigation*, 887 F. Supp. 1469,

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1475 (N.D. Ala. 1995) (products liability); *Interpane Coatings, Inc. v. Australia & New Zealand Banking Group Ltd.*, 732 F. Supp. 909 (N.D. Ill. 1990) (breach of contract and negligence); *Durkin v. Intevac, Inc.*, 782 A.2d 103, 112 (Conn. 2001) (products liability). *See also Hanimex Pty Ltd. v. Kodak (Australasia) Pty Ltd.* (1982) A.T. P.R. ¶45-593 (trade libel); *Sungravure Pty Ltd. v. Middle East Airlines Airliban SAL* (1975) 134 C.L.R. 1 (injurious falsehood); *Pavey v. Matthews Pty Ltd.* (1987) 162 C.L.R. 221 (unjust enrichment); *Ansett Transport Indus. (Operations) Pty Ltd. v. Australian Fed. of Air Pilots* (1991) 1 V.R. 637 (interference with contractual relations).

The above seven factors weigh against the exercise of personal jurisdiction. Requiring PC Tools to litigate this dispute in Washington would be unreasonable and would not comport with traditional notions of fair play and substantial justice.

B. GENERAL JURISDICTION

"In a controversy unrelated to a defendant's contacts with the forum, a court may exercise general jurisdiction only where 'continuous corporate operations within a state [are] thought so substantial and of such a nature as to justify suit against [the defendant] on causes of action arising from dealings entirely distinct from those activities.'" *Tuazon*, 433 F.3d at 1169 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 318 (1945)). "The standard for general jurisdiction is high; contacts with a state must 'approximate physical presence.'" *Id.* (quoting *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000)). "Put another way, a defendant must not only step through the door, it must also '[sit] down and [make] itself at home.'" *Id.* (quoting *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1125 (9th Cir. 2002)). As a result, "courts have been understandably reluctant to exercise general jurisdiction." *Tuazon*, 433 F.3d at 1172.

PC Tools is an Australian company with a principal place of business in Australia. PC Tools does not have substantive, relevant contacts to Washington. *See* Declaration of Neill Whitehead, ¶ 5. PC Tools has only limited contacts with Washington via PC Tools' website.

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See Declaration of Neill Whitehead, ¶ 6. Given the paucity of these contacts with Washington, PC Tools did not "sit down and make itself at home" in Washington. Exercising general jurisdiction would be inappropriate.

II. FORUM NON CONVENIENS

"A district court has discretion to decline to exercise jurisdiction in a case where litigation in a foreign forum would be more convenient for the parties." *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1142 (9th Cir. 2001). "In exercising this discretion, a court will consider whether an adequate alternate forum exists and whether the balance of public and private interests favors a different forum." *Id.*

A. ADEQUATE ALTERNATIVE FORUM

The Supreme Court has held that an alternative forum ordinarily exists when the defendant is amenable to service of process in the foreign forum. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n. 22. This threshold test is met here because PC Tools is an Australian company that is amenable to service of process in Australia.

The foreign forum also must provide the plaintiff with some remedy for the wrongs it alleges. *See Lueck*, 236 F.3d at 1143. However, it is only in "rare circumstances...where the remedy provided by the alternative forum…is so clearly inadequate or unsatisfactory, that it is no remedy at all." *Id. See also Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1178 (9th Cir. 2006) (stating that "[t]his test is easy to pass").

Here, Australian law provides analogous causes of action to those pled by Zango. Australian law recognizes causes of action for tortious interference with contractual relations, trade libel, and unjust enrichment. *Hanimex Pty Ltd. v. Kodak (Australasia) Pty Ltd.* (1982) A.T. P.R. ¶45-593 (addressing trade libel as a cause of action); *Sungravure Pty Ltd. v. Middle East Airlines Airliban SAL* (1975) 134 C.L.R. 1 (addressing injurious falsehood as a cause of action and its parallels with trade libel); *Pavey v. Matthews Pty Ltd.* (1987) 162 C.L.R. 221 (addressing unjust enrichment and restitution as an available remedy); *Ansett Transport Indus. (Operations)*

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Pty Ltd. v. Australian Fed. of Air Pilots (1991) 1 V.R. 637 (addressing interference with contractual relations as a cause of action). As a result, Australia provides an adequate alternative forum. *See, e.g., Allstate Life Ins. Co.*, 994 F.2d at 1001-1002 (Australia provides adequate forum for securities fraud claims); *Great Prize, S.A.*, 967 F.2d at 160 (Australia provides adequate forum for dispute regarding ownership of property); *In re Silicone Gel Breast Implants Products Liability Litigation*, 887 F. Supp. at 1475 (Australia provides adequate forum for products liability claim); *Interpane Coatings, Inc.*, 732 F. Supp. at 909 (Australia provides adequate forum for breach of contract and negligence); *Durkin*, 782 A.2d at 112 (products liability).

B. PRIVATE FACTORS

The following seven factors are used to evaluate private interest factor considerations: (1) the residence of the parties and witnesses; (2) the forum's convenience to the litigants; (3) access to physical evidence and other sources of proof; (4) whether unwilling witnesses can be compelled to testify; (5) the cost of bringing witnesses to trial; (6) the enforceability of the judgment; and (7) any practical problems or other factors that contribute to an efficient resolution. *Lueck*, 236 F.3d at 1145. In applying these factors, "[t]he district court should look to any or all of the above factors which are relevant to the case before it, giving appropriate weight to each." *Id*. "This guidance grants the district court the broadest possible discretion." *Tuazon*, 433 F.3d at 1180.

1. RESIDENCE OF PARTIES AND WITNESSES AND CONVENIENCE.

Regarding the first and second factors, PC Tools is an Australian company, and because PC Tools made all of the classification decisions concerning Zango in Australia, all of the witnesses and evidence concerning those decisions are in Australia. Zango's case asks PC Tools to explain its conduct – the answer is found in the documents and testimony of people residing in Australia.

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2. Access to Evidence and Witnesses.

With respect to the third, fourth and fifth factors, "[t]he crucial focus is not on 'the number of witnesses or quantity of evidence in each locale,' but rather 'the materiality and importance of the anticipated [evidence and] witnesses' testimony and then […] their accessibility and convenience to the forum.'" *Id.* at 1181 (quoting *Lueck*, 236 F.3d at 1146). Most if not all of the material evidence, and witnesses who can testify, concerning the classification decisions made by PC Tools with respect to Zango's software reside in Australia. While Zango has some witnesses in Washington, the vast majority of witnesses and evidence relating to the crux of this case reside in Australia. As a result, the third, fourth, and fifth factors weigh heavily in favor of Australia as the most appropriate forum.

3. Enforceability of Judgment.

A injunction obtained in a U.S. court might not be enforceable in Australia. At first glance, it appears Australia has a "blocking statute" that, *inter alia*, could prohibit the enforcement in Australia of an injunction issued by a foreign court. *See* Foreign Proceedings (Excess of Jurisdiction) Act 1984 – Section 14. In contrast, an Australian judgment may be enforceable in the United States. *See, e.g.*, *South Carolina Nat. Bank v. Westpac Banking Corp.*, 678 F. Supp. 596 (D.S.C. 1987). Zango has an alternative forum in Australia, and this factor favors dismissal.

C. Public Factors

The following five public interest factors also must be considered: (1) the local interest in the lawsuit; (2) the court's familiarity with the governing law; (3) the burden on local courts and juries; (4) congestion in the court; and (5) the costs of resolving a dispute unrelated to a particular forum. *Tuazon*, 433 F.3d at 1181.

1. Local Interest.

Washington has an interest in protecting its citizens, and Zango is a citizen. But Washington does not have an interest in trying to tie the hands of PC Tools, a leading anti-

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spyware provider legitimately characterizing the software of a company that less than three months ago entered into a final settlement in FTC proceedings whereby it agreed to a $3 million fine and strict controls on the future operation of its adware business. Washington certainly does not have an interest in making its citizens vulnerable to malware – the type of software associated with Zango and detected by PC Tools.

The Australian Government has an interest in ensuring that unreasonable restrictions are not placed on its resident corporations' abilities to conduct business and, in the case of PC Tools, provide computer security to consumers. In the same context, the Australian Government would have more of an interest in policing its resident corporations if indeed Zango could prove any wrongdoing. By contrast, PC Tools has not targeted any of its commercial activities at Washington, and certainly not specifically at Zango, which initiated the contact with PC Tools in Australia.

2. GOVERNING LAW.

Washington has adopted the most significant relationship rule for choice-of-law problems in cases sounding in tort. *See Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 555 P.2d 997 (1976). There is a two-step analysis in assessing which forum has the most significant relationship. First, the court must evaluate the contacts with each potentially interested forum based on the following factors: (a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (d) the place where the relationship, if any, between the parties is centered. *Id*. at 581, 555 P.2d 997 (citing *Restatement (Second) of Conflict of Laws* §§ 145). These factors are evaluated according to their relative importance with respect to the particular issue. *Id*. "The approach is not merely to count contacts, but rather to consider which contacts are most significant and to determine where these contacts are found." *Southwell v. Widing Transportation*, 101 Wn.2d 200, 204, 676 P.2d 477 (1984).

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The second analytical step involves an evaluation of the interests and public policies of the concerned forums. "The extent of the interest of each potentially interested state should be determined on the basis, among other things, of the purpose sought to be achieved by their relevant local law rules and the particular issue involved." *Southwell*, 101 Wn.2d at 204, 676 P.2d 477 (*citing Johnson*, 87 Wn.2d at 582, 555 P.2d 997).

Here, while the alleged injury to Zango occurred in Washington, the conduct causing the alleged injury occurred in Australia. Zango is in Washington; PC Tools is in Australia. But the final factor, the place where the parties' relationship is centered, is Australia. That is the place that houses the Malware Research Centre and is the place where Spyware Doctor is developed. That is the place Zango wants to focus this case and the parties' relationship.

Accordingly, Australian law applies to Zango's claims. Dismissal is thus appropriate to allow an Australian court to interpret Australian law. *See Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d at 1181.

3. Burden on Court and Cost.

There is no reason to believe that the burden on this Court and/or that the congestion in this Court is lighter than the burden on, and congestion in, a corresponding court in Australia. Because all of PC Tools' witnesses are located in Australia, the cost of resolving the dispute will be less if the case is adjudicated in Australia.

Accordingly, because Australia provides an adequate alternative forum and the private and public factors support the conclusion that Australia is the proper forum, the case should be dismissed based on the doctrine of forum non conveniens.

III. Venue

Another proper basis for dismissal is improper venue. The Western District of Washington is not the proper venue for this suit. Zango's Complaint fails to allege any conduct that occurred in the Western District of Washington that caused injury to Zango. All allegedly improper conduct occurred outside of this venue (indeed in Australia), and, therefore, this case

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should be dismissed. Once venue is challenged, the burden is on the plaintiff to show that venue is proper. *See Kelly v. Qualitest Pharms., Inc. Piedmont Label Co.*, 2006 WL 2536627 (D.C. Cal. 2006); *see also Piedmont Label Co. v. Sun Garden Packing Co.*, 598 F.2d 491, 496 (9th Cir. 1979).

Pursuant to Fed. R. Civ. P. 12(b) (3) and 28 U.S.C. § 1406(a), an action that is filed in the wrong district court shall be dismissed. A showing of sufficient contacts necessary for personal jurisdiction does not necessarily suffice to show proper venue. *T-Mobile USA, Inc. v. Walts*, 2006 U.S. Dist. LEXIS 45034 (D. Wash. 2006). And similar to the personal jurisdiction analysis above, Zango cannot demonstrate that a "substantial part of the events or omissions giving rise to the claim occurred" in the Western District of Washington. Thus, dismissal is appropriate.

In cases where jurisdiction is founded solely on diversity of citizenship, as in this case, venue is governed by 28 U.S.C. § 1391(a). *Jorgens v. P & V, Inc.*, 2007 U.S. Dist. LEXIS 24397 (D. Cal. 2007). This statutory provision provides in relevant part:

> A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which the defendants are subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(a). In applying this statute to a corporate entity, a corporation is "deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced." 28 U.S.C. 1391(c). PC Tools is not a resident of the Western District of Washington and, as shown above, is not subject to personal jurisdiction in Washington. Thus, determining proper venue turns on the second prong of the venue statute – whether a substantial part of the events or omissions took place in the Western District of Washington. In making such a determination, a court should evaluate what constitutes a "substantial part" in light of the

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purpose of the venue statute, *i.e.*, to protect the defendant from having to defend in an unreasonably burdensome forum." *Remley v. Lockheed Martin Corp.*, No. C002495CRB, 2001 WL 681257, at *3 (N. D. Cal. June 4, 2001) (citation). "The purpose of the venue statute is to 'give defendants some control over the place of trial.'" *Id.* When a plaintiff brings a suit in an improper venue, the proper remedy is for the court to "dismiss [the case], or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." 28 U.S.C. § 1406(a). Where there is no alternative venue to bring suit, however, transfer will not cure the defect in venue, and the proper remedy is for the court to dismiss the action. *See* Fed. R. Civ. P. 12(b)(3); *Argueta v. Banco Mexicano*, 87 F.3d 320, 324 (9th Cir. 1996); *Abrams Shell v. Shell Oil Co.*, 165 F. Supp. 2d 1096, 1102 (C.D. Cal. 2001).

Virtually none, if any, of the events giving rise to Zango's claims took place in the Western District of Washington, let alone a "substantial part" of the events giving rising to Zango's claims. The Complaint alleges business torts based on PC Tools' conduct in its Malware Research Centre in Sydney, Australia.

To keep the action in the Western District of Washington would defeat the purpose of the venue statute because it would require PC Tools to defend in an "unreasonably burdensome forum." Because Zango has not established, and cannot establish, that the Western District of Washington is "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred," venue is not proper in this district, and the lawsuit should be dismissed.

CONCLUSION

For the foregoing reasons, PC Tools respectfully requests that this Court dismiss Zango's complaint in its entirety.

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Dated May 31, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

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